

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of	:	
All About the Message, LLC	:	
Petition for Declaratory Ruling	:	CG Docket No. 02-278
	:	
Rules and Regulations Implementing the	:	DA No. 17-368
Telephone Consumer Protection Act of 1991	:	

COMMENTS OF JUSTIN T. HOLCOMBE

I. Introduction.

I am submitting these comments both in my individual capacity as a subscriber of cellular telephone services and in my capacity as an attorney for other consumers who are fed up with the constant barrage of telephone calls from businesses who either ignore the TCPA's consent requirements or continuously look for new ways to skirt them. I respectfully oppose the request of All About the Message, LLC ("AATM"). The request, if granted, would make cellular voicemail become useless as mailboxes would be flooded to capacity with nuisance telemarketing, debt collection, and scam automated voice mail messages. This is evident by the pervasive conduct of such callers the Commission recognized in its 2015 Declaratory Ruling, as well as that recognized by Congress in passing the TCPA and the Do-Not-Call Implementation Act.

People carry their cellular telephones with them at most times. When they do not, it usually because they cannot (such as when entering most federal courthouses). At those times, voicemail is the primary method to receive important calls (e.g., your child was hurt at school, your medical lab test results have arrived, etc.). However, voice mail services are limited. My plan with T-Mobile is limited to 45 messages at a time. It would be easy for a single caller to fill up my mailbox with these messages, and leave me unable to receive the important messages that

I pay for the service in order to receive. Even if my voice mailbox was not full, I may have to filter through a dozen robocalls before I find the important message buried in the haystack, or miss it entirely.

This Commission released its Omnibus Declaratory Ruling on July 10, 2015 emphasizing the need to “empower consumers to decide which robocalls and text messages they receive, with heightened protection to wireless consumers” and to “preserve consumer's rights to stop unwanted robocalls . . . and thus respond to the many who have let [the Commission], other federal agencies, and states know about their frustration with robocalls.”¹ I respectfully ask the Commission to protect the use of voicemail services from this abusive attempt to skirt the Commission’s TCPA rules by denying the petition of AATM.

II. Using a Cellular Carrier’s Transmission Facilities to Deliver a Prerecorded Voice message to a Cellular Telephone Number Constitutes a Call.

All About the Message, LLC (AATM), like many others before the Commission in the past, is now requesting a blanket exemption for its line of business to allow it unfettered access to consumers’ time and cellular telephones without consent and without permitting the consumer any power for the calls to cease. They want the Commission to declare that every voicemail they deliver to a cellular telephone number using the carrier’s transmission facilities (whether through an internet connection or a pilot number) is not a call and is not subject to the TCPA. This would not only exempt them from the TCPA’s restrictions on automated telephone calls, it would exempt them the TCPA entirely, including the requirement to honor do-not-call requests.²

The TCPA was passed in 1991 to deal with the nuisance and invasion of privacy of

¹ *Federal Communications Commission Omnibus Declaratory Ruling and Order*, CG Docket No. 02-275 WC Docket No. 07-135, ¶ 43 (released July 10, 2015) (“2015 Declaratory Ruling”).

² 47 C.F.R. § 64.1200(d) (No person or entity shall initiate any *call*...)(*emphasis added*).

unconsented to prerecorded voice calls.³ In enacting the TCPA, Congress found that robocalls, regardless of their content, were a nuisance and an invasion of privacy.⁴ The TCPA prohibits calling a *number* that is assigned to a cellular telephone service.⁵ The phrase “to a cellular telephone service” refers to the type of service to which a number would be assigned, wherein it would be illegal to transmit a prerecorded voice to that number.

Functionally, whether the call is made directly to the cellular telephone or indirectly by using the carrier's transmission services (where the subscriber's number still must be inputted in order to drop the voice mail), the impact on the subscriber is still the same. The subscriber gets an alert, the prerecorded voice is pushed to the phone, and the subscriber has "to listen to a lot of useless voicemail."⁶ And today, cellular telephones come preinstalled with visual voicemail, where the consumer receives the voicemail directly to their device, often transcribed into a text message, along with a ringtone alert.⁷

Courts that have been asked to define what constitutes a “call” have determined that any attempt to communicate with a cellular telephone number constitutes a "call" under the TCPA.⁸ The calls described by AATM are virtually the same as emailing the carrier’s SMS gateway email address.⁹ Such technology has been found to be covered by the TCPA since at least

³ *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D.Ga. 2013).

⁴ TCPA, 105 Stat. 2394, § 2, ¶ 10.

⁵ 47 U.S.C. § 227(b)(1)(A)(iii).

⁶ *Soppet v. Enhanced Recovery Corp.*, 679 F. 3d 637, 639 (7th Cir. 2012) (recognizing that voicemails are costly and subject to the TCPA).

⁷ <https://support.t-mobile.com/docs/DOC-10421> (“Keep in mind, the [visual voicemail] app comes preinstalled on most new devices.”).

⁸ *See, e.g., Joffe v. Acacia Mortgage*, 121 P. 3d 831, 835-36 (Az. App. 2005); *Pollock v. Island Arbitration & Mediation, Inc.*, 22 Misc. 3d 463, 869 N.Y.S.2d 740 (City Ct. 2008); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F.Supp.2d 999, 1007 (N.D.Ill.2010).

⁹ *See Joffe*; 2015 Declaratory Ruling at ¶¶ 113-14.

2005.¹⁰ Whether the call is made directly to the cellular number or routed through the carrier's transmission facilities, "the end result is the same. The recipient's cellular telephone carrier forwards what is a [] message to the recipient's cellular telephone."¹¹ Again here, the carrier forwards what is a prerecorded voice message to the recipient's cellular telephone by directing the carrier's transmission facility to deliver the message to the subscriber's telephone number.

The FCC has addressed this same technology.

There is no dispute that Internet-to-phone text messaging technology is used to initiate calls that ultimately are carried over wireless carriers' networks to wireless consumers via their respective unique telephone numbers. Rather than using a wireless phone to initiate the call, the sender has chosen to initiate text messages using equipment that nevertheless "dials" numbers in a fashion required by and compatible with the technical characteristics, features, and functionalities of the wireless carrier's network. The TCPA's text and legislative history reveal Congress's intent to give the Commission broad authority to enforce the protections from unwanted robocalls as new technologies emerge. We therefore believe Congress intended the word "dial" to mean initiating a communication with consumers through use of their telephone number by an automated means that does not require direct human intervention, recognizing that the specific actions necessary to do so will depend on technical requirements of the carrier's network. The carrier's domain name performs the same function as routing data existing within the telephone network and used in a "traditional" voice or text call to identify the called party's carrier so that the call can be routed to the correct carrier for completion to the called party's wireless telephone number. The fact that a component of the call that is invisible to the called party involves using a domain name to identify the wireless carrier does not change this analysis.

We conclude that by addressing a message using the consumer's wireless telephone number (e.g., 5555551111@sprint.messaging.net or entering a message on a web portal to be sent to a consumer's wireless telephone number) and sending a text message to the consumer's wireless telephone number, the equipment dials a telephone number and the user of such technology thereby makes a telephone call to a number assigned to a wireless service as contemplated in section 227(b)(1) of the Act.

From the recipient's perspective, Internet-to-phone text messaging is functionally equivalent to phone-to-phone text messaging, which the Commission has already confirmed falls within the TCPA's protection. And the potential harm is identical

¹⁰ *Joffe* at 836.

¹¹ *Joffe* at 838.

to consumers; unwanted text messages pose the same cost and annoyance to consumers, regardless of whether they originate from a phone or the Internet. Finding otherwise—that merely adding a domain to the telephone number means the number has not been “dialed”—when the effect on the recipient is identical, would elevate form over substance, thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA’s protections, and potentially open a floodgate of unwanted text messages to wireless consumers.¹²

The technology used by AATM is the prerecorded voice functional equivalent to the email to SMS gateway scenario described in *Joffe* and the 2015 TCPA Omnibus Order. In both cases, they are using the carrier's stored communications transmission facilities to transmit to the cellular telephone number a type of communication that is prohibited by the TCPA. And the harm to the consumer is the same as a phone to phone prerecorded message.¹³

III. The Enhanced/Basic Services Dichotomy is a Red Herring.

AATM argues in its petition that since voicemails are an enhanced service, they cannot be regulated under the Communications Act, and therefore, are not subject to the TCPA. However, emails are an enhanced service as well, but the Commission has already determined that sending an email to the carrier’s SMS gateway address is subject to the TCPA.¹⁴ When creating the distinction between enhanced and basic services, the Commission was not considering the TCPA, which was not even enacted at the time.

In its TCPA rulings, the Commission has relied on what technology does (i.e., the function) rather than on technical regulatory provisions relating to its regulation of common carriers. For instance, in 2015 the Commission declined to read “cellular telephone service” as

¹² 2015 Declaratory Ruling at ¶¶ 113-15.

¹³ The Commission need not decide whether or not such calls are autodialed, because this technology only works by leaving a prerecorded message. Prerecorded message calls are prohibited no matter how they are dialed.

¹⁴ *Id.*

being limited to those services using the Cellular Services spectrum block.¹⁵ Rather, the Commission concluded that all calls to wireless numbers were considered calls to a cellular telephone service regardless of the wireless spectrum block used, considering those services to be “functionally equivalent.”¹⁶ In its 2003 Ruling, the Commission determined that predictive dialers were subject to the TCPA, again by focusing on the “basic function” of such system.¹⁷ And when considering email to SMS Gateway technology similar to that at issue in AATM’s petition, the Commission again relied on the function of the system finding it “functionally equivalent to phone-to-phone text messaging.”¹⁸ Unlike other regulatory provisions of the Communications Act, “the TCPA is a remedial statute, [and] it should be construed to benefit consumers.”¹⁹ AATM’s methods are the functional equivalent of a direct phone-to-phone call and should be regulated accordingly.

IV. AATM Should Not be Granted a Waiver.

AATM has not shown that it should be granted a waiver. Unlike the fax rule, which was ambiguous as to whether it applied to *solicited* faxes not otherwise regulated under the statute, the TCPA expressly prohibits calling a cellular telephone number using a prerecorded voice.²⁰ Its biggest competitor, VoApps, filed a similar petition several years ago, and then withdrew it. AATM was aware of the TCPA requirements, aware that its calling system was likely subject to them, and attempted to circumvent them by using functionally equivalent technology.²¹ It is not

¹⁵ *Id.* at fn. 174.

¹⁶ *Id.*

¹⁷ 18 FCC Rcd. 14014, ¶ 132 (2003).

¹⁸ 2015 Declaratory Ruling at ¶ 115.

¹⁹ *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 271 (3rd Cir. 2013).

²⁰ 47 U.S.C. § 227(b).

²¹ *See* 18 FCC Rcd. 14014, ¶ 132 (2003) (Noting that Congress gave the Commission authority to

“unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”²² AATM should bear the brunt of having crossed that line, not the consumers who were called without their consent.

V. Conclusion.

Using the carrier’s transmission facilities to deliver a prerecorded voice to a telephone number is just as much of a call as using the carrier’s transmission facilities to deliver a text message. Both the Commission and the Courts have routinely addressed that technology, and this functionally equivalent technology should be treated no differently. To approve of AATM's delivery method will undoubtedly have the inevitable and undesired effect of creating a massive loophole in the Commission’s rules and opening the floodgate of unsolicited, prerecorded telemarketing messages. Accordingly, I respectfully request the Commission to deny AATM’s petition.

Respectfully submitted,



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consider changes in technology and finding the TCPA’s definition of “automatic telephone dialing system” was drafted so that its rules would “not be circumvented.”

²² *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 72 S. Ct. 329, 96 L. Ed. 367 (1952).